

Lisa S. Kantor, Esq., SBN 110678  
e-mail: [lkantor@kantorlaw.net](mailto:lkantor@kantorlaw.net)  
Elizabeth K. Green, Esq. SBN 199634  
e-mail: [egreen@kantorlaw.net](mailto:egreen@kantorlaw.net)  
KANTOR & KANTOR, LLP  
19839 Nordhoff Street  
Northridge, CA 91324  
Telephone: (818) 886-2525  
Facsimile: (818) 350-6272

Attorneys for Plaintiff,  
Jonathan Mischo

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JONATHAN MISCHO,  
  
Plaintiff,  
  
v.  
  
UNITEDHEALTHCARE  
INSURANCE COMPANY,  
  
Defendant.

Case No.:

**COMPLAINT FOR:**

**BREACH OF THE EMPLOYEE  
RETIREMENT INCOME  
SECURITY ACT OF 1974;  
ENFORCEMENT AND  
CLARIFICATION OF RIGHTS;  
REQUEST FOR EXPEDITED  
ERISA TRIAL; REQUEST FOR  
ATTORNEYS' FEES AND COSTS**

Plaintiff, JONATHAN MISCHO, herein sets forth the allegations of his  
Complaint against Defendant, UNITEDHEALTHCARE INSURANCE  
COMPANY.

**PRELIMINARY ALLEGATIONS**

1. Jurisdiction - This action is brought under 29 U.S.C. §§ 1132(a), (e), (f)  
and (g) of the Employee Retirement Income Security Act of 1974 (hereinafter  
“ERISA”) as it involves a claim by Plaintiff for employee benefits under an  
employee benefit plan regulated and governed under ERISA. Jurisdiction is  
predicated under these code sections as well as 28 U.S.C. § 1331 as this action

1 involves a federal question. This action is brought for the purpose of obtaining  
 2 benefits under the terms of an employee benefit plan and enforcing Plaintiff's rights  
 3 under the terms of an employee benefit plan. Plaintiff seeks relief, including but not  
 4 limited to: payment of benefits, prejudgment and post judgment interest, and  
 5 attorneys' fees and costs.

6 2. Plaintiff, Jonathan Mischo, is a resident of San Francisco, California,  
 7 and at all times relevant was a resident in San Francisco County, California.  
 8 Therefore, venue is proper in this judicial district pursuant to 29 U.S.C. §  
 9 1132(e)(2).

10 3. Plaintiff was at all relevant times a covered spouse under an employee  
 11 group health benefit plan ("Plan") pursuant to which he was entitled to health  
 12 benefits.

13 4. Plaintiff is informed and believes that Defendant UnitedHealthcare  
 14 Insurance Company ("United") insured and administered health benefits under the  
 15 Plan.

16 5. Plaintiff is informed and believes that United has its principal place of  
 17 business in Hartford, Connecticut, is authorized to transact and is transacting  
 18 business in this judicial district, the Northern District of California, and can be  
 19 found in the Northern District of California.

## 20 **FIRST CAUSE OF ACTION**

### 21 **FOR DENIAL OF PLAN BENEFITS UNDER ERISA**

22 6. Plaintiff incorporates by reference the foregoing paragraphs as though  
 23 fully set forth herein.

#### 24 **Plaintiff's Medical History**

25 7. Plaintiff Jonathan Mischo is a 44-year old man who was diagnosed  
 26 with Multiple Sclerosis ("MS") in 2016. MS is a chronic disease affecting the  
 27 central nervous system (brain and spinal cord). MS is the most common disabling  
 28

1 neurological disease of young adults with symptom onset generally occurring  
2 between the ages of 20 and 40.

3 8. Mr. Mischo has been treated for MS with Rituxan since 2016. Mr.  
4 Mischo has received treatment for MS at the University of California San Francisco  
5 Multiple Sclerosis Center (“UCSF”).

6 9. Mr. Mischo’s prior health insurance insurer, Blue Shield of California,  
7 approved benefits for Mr. Mischo’s Rituxan infusions through 2017.

8 10. Mr. Mischo’s health insurance coverage with United began in 2018.  
9 United approved benefits for his Rituxan infusions.

10 11. Mr. Mischo has a history of infusion reactions with a Rituxan  
11 biosimilar, Ocrevus. In March 2018, Mr. Mischo attempted Ocrevus for two  
12 infusions. He experienced multiple infusion reactions including itching, burning  
13 sensation, lump in throat, nausea, pronounced tachycardia, and hypertension. These  
14 symptoms did not resolve even hours after stopping the infusion. Mr. Mischo was  
15 transferred to the emergency room and an EKG demonstrated sinus tachycardia and  
16 possible prior inferior infarction.

17 12. Following his reactions to Ocrevus, Mr. Mischo resumed Rituxan  
18 infusions and United approved benefits. Once resuming Rituxan, Mr. Mischo  
19 tolerated the infusions with careful adjustment of pre-medications and  
20 administration.

21 13. United approved and paid for Mr. Mischo’s two Ocrevus infusions,  
22 followed by Rituxan infusions, until October 2020.

23 Defendant’s Denial of Benefits

24 14. In a letter dated November 8, 2021, United denied further benefits for  
25 Rituxan claiming Mr. Mischo did not “try Truxima or Ruxience” which are other  
26 Rituxan biosimilars.

27 15. Mr. Mischo’s pharmacist at UCSF, Dr. Steven Merrill, attempted to  
28 schedule a peer to peer review with United on or about November 22, 2021 and

1 United refused to schedule a review. Dr. Merrill reported that he was required to  
2 speak to a dozen different people at United and they would not schedule a peer  
3 review.

4 16. On November 23, 2021, Dr. Ari Green, Plaintiff's treating neurologist  
5 and Director of the UCSF Multiple Sclerosis Center, wrote a letter appealing the  
6 denial on behalf of Mr. Mischo. Dr. Green explained Mr. Mischo's infusion  
7 reactions to Ocrevus and that Mr. Mischo is able to tolerate Rituxan infusions. Dr.  
8 Green further explained:

9 Given his history, transitioning to a Rituxan biosimilar such as  
10 Ruxience or Truxima may expose patient to unnecessary risk for  
11 severe infusion reactions and further delay care.

12 Based on this patient's diagnosis, disease severity, and medical  
13 history, I believe that Rituxan appropriate and medically necessary for  
14 this patient, and would appreciate a reconsideration of this service.

15 Due to delays for COVID-19 vaccination patient has not been treated  
16 with Rituxan in over 12 months. Please process this appeal  
17 URGENTLY as further delay places patient at ongoing risk for  
18 serious relapse and/or development of permanent disability.

19 Dr. Green enclosed clinical notes and laboratory testing results.

20 17. In a letter dated December 8, 2021, United denied the appeal claiming,  
21 "your health plan covers Rituxan only if you have tried taking and failed to benefit  
22 from" Truxima or Ruxience.

23 18. On December 9, 2021, Dr. Green wrote a second letter of appeal to  
24 United. Dr. Green explained that Rituxan has shown success in major clinical trials  
25 for the treatment of MS and to his knowledge, "there are no prospective clinical  
26 trials evaluating either Ruxience or Truxima for the treatment of MS." Dr. Green  
27 wrote that given Mr. Mischo's history of infusions:  
28

[Mr. Mischo is] at significant risk for infusion reactions. Transitioning him to a Rituxan biosimilar such as Ruxience or Truxima may expose patient to unnecessary risk for another serious infusion reaction. The cardiac risks are particularly concerning given his history of obesity, HTN and EKG abnormalities. Furthermore, evidence is lacking that Ruxience or Truxima are effective for MS.

Dr. Green enclosed clinical notes and laboratory testing results. Dr. Green requested that United reverse its decision.

19. On December 20, 2021, United denied the second appeal. United relied on the opinion of an internal medicine physician, Dr. Joan W. Huppi, who specializes in geriatrics<sup>1</sup>. Neurology is the appropriate medical specialty for review of a patient who is diagnosed with MS. United asserted a new basis for denial in its letter, claiming that Rituxan was not medically necessary for Mr. Mischo even though United previously approved Rituxan to treat Mr. Mischo's MS. Dr. Huppi claimed that there is "not enough evidence found in the medical literature to show that Rituxan is effective for your condition. The health plan does not cover treatments that are not medically necessary for your care."

20. Pursuant to California law, Mr. Mischo's provider submitted "necessary justification and supporting clinical documentation supporting the provider's determination that the required prescription drug is inconsistent with good professional practice for provision of medically necessary covered services to the enrollee, taking into consideration the enrollee's needs and medical history, along with the professional judgment of the enrollee's provider" which provided sufficient exception to United's step therapy policy. Cal. Health & Safety Code § 1367.206(b).

<sup>1</sup> <https://doctor.webmd.com/doctor/joan-huppi-603003a1-36b5-400b-9f8d-7212e2c4483d-overview>

1           21. Dr. Green provides the attached letter stating that further delay of Mr.  
2 Mischo's Rituxan infusion risks new MS relapse or disease progression which may  
3 leave him with permanent disabilities and cause irreparable harm. (See Exhibit A to  
4 the Complaint). Due to the risks facing Mr. Mischo, Dr. Green requests that this  
5 litigation be given the highest priority and expedited to whatever extent possible.

6           22. Mr. Mischo requests immediate approval of benefits for Rituxan.

7           23. Mr. Mischo exhausted all appeals under the Plan.

8           24. Defendant wrongly denied benefits for Rituxan in the following  
9 respects, among others:

10           (a) Failure to authorize and pay for medical services rendered to Mr.  
11 Mischo as required by the Plan at a time when United knew Mr.  
12 Mischo was entitled to such benefits under the terms of the Plan;

13           (b) Failure to provide reasonable explanations of the bases relied on  
14 under the terms of the Plan, in relation to the applicable facts and plan  
15 provisions, for the denial of claims for medical benefits;

16           (c) After claims were denied in whole or in part, failure to  
17 adequately describe to Mr. Mischo any additional material or  
18 information necessary to perfect his claim along with an explanation of  
19 why such material is or was necessary;

20           (d) Failure to properly investigate the merits of the claim and appeal  
21 submission;

22           (e) Failure to conduct a peer review requested by Mr. Mischo's  
23 pharmacist; and

24           (f) Failure to provide Mr. Mischo with a full and fair review  
25 pursuant to 29 C.F.R. § 2560.501-1 (h)(3)(iii) by failing to consult with  
26 health care professionals who have appropriate training and experience  
27 in the field of medicine involved in the medical judgment.  
28



**REQUEST FOR RELIEF**

Plaintiff requests an expedited ERISA bench trial due to the extenuating circumstances as set forth in the foregoing paragraphs. Plaintiff suffers risks of irreparable harm or permanent disability if he does not receive Rituxan, a medication which has been proven to treat his MS, he has been able to tolerate, and United previously approved until October 2020.

Plaintiff requests that the Court set a trial briefing filing deadlines and a trial oral argument date to occur within 90 days following Defendant's production of the complete ERISA record to Plaintiff.

Plaintiff requests judgment against Defendant as follows:

1. Approval of medical benefits due to Plaintiff under the Plan;
2. Pursuant to 29 U.S.C. § 1132(g), payment of all costs and attorneys' fees incurred in pursuing this action; and
3. For such other and further relief as the Court deems just and proper.

DATED: April 5, 2022

KANTOR & KANTOR, LLP

BY: s/ Elizabeth K. Green  
Elizabeth K. Green  
Attorneys for Plaintiff  
Jonathan Mischo